

In the Matter of Merchant Mariner's Document No. Z-517497-D1 and  
All Other Seaman Documents

Issued to: RICHARD D. ALLEE

DECISION OF THE COMMANDANT  
UNITED STATES COAST GUARD

1035

RICHARD D. ALLEE

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.11-1.

By order dated 5 November 1957, an Examiner of the United States Coast Guard at New Orleans, Louisiana, suspended Appellant's seaman documents upon finding him guilty of misconduct. Two specifications allege that while in the service of the American SS YAQUE as an oiler and acting under the authority of the document above described, on or about 19 October 1957, Appellant assaulted and battered another member of the crew, Irwin J. Kramer, with his fists.

The hearing was heard in joinder with the case against Irwin J. Kramer who was charged with assault and battery on Appellant during the same incident. Neither seaman was represented by counsel and they both entered pleas of not guilty. The Investigating Officer called the allegedly assaulted Kramer to testify against Appellant and one of the two wipers, who were eyewitnesses, to testify as to both cases. The wiper stated that he did not know who struck the first blow in the fight between Appellant and Kramer. The other wiper was not called to testify although he was waiting outside the hearing room. Investigating Officer then rested in both cases. Neither Appellant nor Kramer cared to testify or to submit other evidence in their behalf. The charges against Kramer were found not proved by the Examiner and dismissed. The Examiner then concluded that the charge and specifications against Appellant had been proved. An order was entered suspending all documents, issued to Appellant, for a period of one month outright and five months on twelve months' probation.

The decision was served on 5 November 1957. Appeal was timely filed on 22 November 1957.

FINDINGS OF FACT

On 19 October 1957, Appellant was serving in the service of

the American SS YAQUE as an oiler and acting under authority of his Merchant Mariner's Document No. Z-517497-D1 while the ship was in the port of Colon, Panama.

On this date, Appellant was walking along a street in Colon when he met two wipers from the ship, Nigliazzo and Camboronne. Kramer, a steward utilityman, approached as Nigliazzo picked up a piece of paper on which Appellant had written the address of a woman he claimed to have been with. Appellant told Nigliazzo to give the address to Kramer because she was a good woman. Kramer said Appellant did not like women and walked away with Nigliazzo. Appellant handed a package to Camboronne, caught up with the other two seamen who had moved a distance of 30 to 50 feet and demanded an explanation from Kramer for his remark to Appellant. Kramer did not answer. Both seamen became angry and prepared to fight while Nigliazzo tried to keep them separated. A fist fight developed although the record contains no affirmative evidence as to which of the two seamen swung first or struck the first blow. The local police stopped the fight. Both men suffered minor injuries and were required to pay a fine of \$30 each.

Appellant has no prior record.

#### BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is contended that the Examiner arbitrarily refused to reopen the hearing to admit the testimony of Appellant and the other wiper; Kramer's remark to Appellant invited mutual combat; Kramer was equally at fault.

APPEARANCE ON APPEAL: Messrs. Byrnes and Wallace of New Orleans, Louisiana, by Edward A. Wallace, Esquire, of Counsel.

#### OPINION

Due to the absence of substantial evidence to support the allegations of assault and battery, the findings of the Examiner that the specifications were proved are reversed.

The testimony of Kramer and Nigliazzo is substantially in agreement with the above findings of fact. Kramer testified that he intended his remark as a joke but the record indicates that Appellant accepted it as an insult. Kramer did not tell Appellant at the time that it was intended as a joke. In fact, Kramer testified that he refused to give Appellant any explanation.

In any event, the important fact is that the record does not

clearly show who struck the first blow or who took the first swing. After Kramer recited his version of the incident without stating that Appellant started the fight, he was asked the objectionable leading question, "Did Mr. Allee swing at you first?" Kramer answer was totally unresponsive to the question, so the Investigating Officer then asked, "Did you swing at him first?" and the answer was, "No sir." Then Kramer answered to another question that he did not remember swinging first; and, finally, that he had not swung before he was hit. Wiper Nigliazzo definitely answered that he could not say who swung first or who struck the first blow.

On this state of the record, it can only be said that Appellant's guilt of having initiated the physical combat is nebulously supported on the basis of the negative testimony of Kramer that he did not swing first. The only disinterested witness repeatedly testified that he did not know who started the fight. Under these circumstances, it seems surprising that Appellant was not required to testify against Kramer and that wiper Camboronne was not called as a witness even though he was waiting outside the hearing room. The Examiner should have called these two available witnesses to testify after the Investigating Officer failed to do so. This error clearly should have been recognized when counsel requested that the hearing be reopened for the purpose of taking the testimony of Appellant and Camboronne.

At the hearing, the Investigating Officer indicated that he did not care to call Camboronne because he would have nothing to add to the evidence. Assuming then that his testimony would have been the same as that of the other disinterested witness, there would have been testimony by two witnesses that they did not know whether Appellant started the fight. Presumably, Appellant would have testified that Kramer started it; and possibly Appellant could have convinced the Examiner that Appellant's version was the true one. It is believed that the Examiner should not have decided that Appellant was guilty of assault and battery against Kramer without having required Appellant to testify in the case against Kramer. Since Appellant was not represented by counsel at the hearing, I do not consider that his failure to voluntarily testify was tacit admission against his interests. If this were so, the same would apply to Kramer's failure to testify in his defense.

At most, this record established that Appellant engaged in mutual combat with Kramer. This conclusion is supported by the \$30 fine against each seaman. The specification alleging assault and battery would be appropriate if Kramer had been seriously injured but the record does not so indicate. Another factor in Appellant's favor is that this encounter occurred ashore rather than on the ship. Since it appears that the testimony of Appellant and the other wiper would not present a less favorable picture of

Appellant's conduct than does the present record, it would serve no purpose to remand the case for further hearing. Therefore, the charge and specification will be dismissed.

ORDER

The charge and specifications are dismissed. The order of the Examiner dated at New Orleans, Louisiana, on 5 November 1957, is

VACATED.

A.E. Richmond  
Vice Admiral, United States Coast Guard  
Commandant

Dated at Washington, D.C., this 7th day of May, 1958.